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No. 83-558

IN THE

Supreme Court of the United States

October Term, 1983

Irving Independent School District

Petitioner

v.

Henri and Mary Tatro, Individually and
Next Friend of Amber Tatro, A Minor

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MOTION TO APPEAR AS AMICUS CURIAE, AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF THE
NATIONAL SCHOOL BOARDS ASSOCIATION
TO FILE BRIEF AS AMICUS CURIAE

The National School Boards Association (NSBA) moves this Court for leave to participate as amicus curiae herein, for the purpose of filing the attached brief in support of the Petition for Certiorari. Counsel for Petitioner has consented to the appearance. A copy of the letter of consent is attached. Counsel for Respondents has not consented.

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Each of the 16,000 school districts, governed by locally elected or appointed school boards, receives or is eligible to receive financial assistance under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq.

NSBA represents districts of different sizes and geographic locations, all of which are affected by the decision below.

some to a much greater degree than even Petitioner. These school districts are spending over $7 billion for special education above the costs of regular education. Rand Corporation Study for U.S. Department of Education The Cost of Special Education. But education is the business of these school districts and they recognize and accept their duty to provide an equal opportunity to handicapped children to receive a quality education. However, this case involves more than equal educational opportunity. It puts school districts across the land in the business of providing medical services to children. School districts haven't the financial or staff resources to provide these services. NSBA, on behalf of these districts, respectfully urges this Court to allow it to state its views on the Petition for Writ of Certiorari.

Respectfully submitted,

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Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Each of the 16,000 school districts, governed by locally elected or appointed school boards, receives or is eligible to receive financial assistance under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq.

REASONS FOR GRANTING THE WRIT

I. The decision below creates a conflict in the circuits on the question of whether plaintiffs can recover attorneys' fees under § 505 of the Rehabilitation Act of 1973 in an action falling within the parameters of the EAHCA.

II. The decision below fails to follow the precedent set by the United States Supreme Court in Southeastern Community College v. Davis, 442 U.S. 397 (1979); Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981); and Board of Education of Hendrick Hudson Central School District v. Rowley,

___ U.S. ___, 102 S. Ct. 3034 (1982).

III. The Fifth Circuit's interpretation of the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq. and § 504 of the Rehabilitation Act of 1975, 29 U.S.C. § 794 exceeds the intent of Congress in enacting these measures and constitutes a severe encroachment of the judiciary into local policy-making.

IV. The decision below was designed for a large urban school district, but must be applied to school districts across the country, including small rural districts.

ARGUMENT

I. The decision below creates a conflict in the circuits on the question of attorneys' fees awards.

The First Circuit Court of Appeals ruled in Smith v. Cumberland School Commit-

tee, 703 F.2d 4, 9-10 (1st Cir. 1983), that "even if there is generally a private right of action under § 504 of the Rehabilitation Act of 1973, we hold that attorneys' fees are unavailable here under the accompanying fees provision. 29 U.S.C. § 794a(b)... While the more specific rights created by the EAHCA may not indicate a congressional intent to preclude 'overlapping' action under § 504, the EAHCA's comprehensive remedial scheme entails a rejection of fee-shifting that properly limits the fees provision of the more general Rehabilitation Act ...."

The court below, after finding a violation of EAHCA, went to the § 504 issue, stating: "The EAHCA does not provide for attorneys' fees awards. The district court awarded attorneys' fees to the Tatros under § 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794a(b) which authorizes such awards to prevailing parties in actions to enforce provisions of the Reha-

bilitation Act." Appendix to Petition for Certiorari at page 77a. The court, after discussing Pennhurst and other cases, concluded that § 504 applied and affirmed the award of attorneys fees. Thus, there is a conflict in the circuits on the question of attorneys fees under § 504, where a violation of EAHCA also exists, which should be resolved by this Court.

II. The decision below fails to follow the precedents set by the United States Supreme Court.

Southeastern Community College v. Davis

The decision below is based on interpretations of two statutes. One of those, § 504 of the Rehabilitation Act of 1973, prohibits discrimination against qualified handicapped children in federally assisted programs and activities. The Supreme Court interpreted that statute in Southeastern Community College v. Davis, 442 U.S. 397 (1979).

This Court, in discussing HEW regula-

tions under § 504, made the observation that: "If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504. Instead, they would constitute an unauthorized extension of the obligations imposed by the statute." Id. at 410.

The court below found a violation of § 504 because Amber Tatro will allegedly be "excluded from the school district's program [because, as a result of the] district's refusal to provide Clean Intermittent Catheterization (CIC) to Amber, she will be unable to participate in the preschool programs of the school district." Appendix to Petition for Certiorari, page 108a. That reasoning begs the question. The school district is not refusing to educate Amber, it is merely refusing to provide a medical service to her in the same

manner as it would refuse to provide medical services to non-handicapped children. The lower court is requiring the districts to "make substantial adjustments to its existing program beyond those necessary to eliminate discrimination."

Pennhurst State School and Hospital v. Halderman

The second statute interpreted by the court below is the Education for All Handicapped Children Act (EAHCA). This statute was passed by Congress pursuant to its spending powers. Its primary objective is to fund elementary and secondary school programs for handicapped children. In order to qualify for the funds, school districts must meet certain requirements, including the development of an individualized education program (IEP), and the development of due process procedures, as set out in the statute.

In Pennhurst, 451 U.S. 1 (1981), this Court, in construing another funding stat-

ute designed to assist states to create programs for the disabled, held: "Legislation enacted pursuant to spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal money, it must do so unambiguously."

The court below attempts to distinguish Pennhurst on the ground that the EAHCA specifically states that school districts must provide "special education and related services" and the "issue in the present case is the scope of those rights." That is true, but it too begs the question. The Supreme Court's decision in Board of Education of Hendrick Hudson v. Rowley, ___ U.S. ___, 102 S. Ct. 3034 (1982), also involved the scope of the right to a "free

appropriate education" yet this Court cited Pennhurst in support of its decision in that case.

The condition in the contract between school districts and the federal government calls for the provision of related services in the context of the provision of "special education." If the Congress indeed intended to include this type of medical service, which is completely outside the scope of the usual business of schools, it should have done so unambiguously.

Board of Education of Hendrick Hudson Central School District v. Rowley

The leading case under the EAHCA is, of course, the Supreme Court decision in Rowley. Rowley holds that the EAHCA provides a "'basic floor of opportunity' consisting of personalized instruction and related services designed to enable handicapped children to benefit from education." Appendix to Petition for Certiorari page

75a. Rowley did not concern the scope of the term "related services." Rather, the issue in the case related to the question of whether a court could impose its own view of a preferred methodology. The Supreme Court answered that question in the negative, holding that the courts' only inquiries should be 1) whether due process procedures are followed and 2) whether the program adopted by the district is designed to assure that the child receives a meaningful education.

There is no contention by Respondents that the school district is failing to provide a "meaningful" education to Amber Tatro. Their only complaint is with the district's refusal to provide CIC, which has no relationship to her education. The issue in this case is not whether Amber Tatro requires a service because of some diagnosed problem, but whether that service is educationally necessary -- in other words, does the provision of the service in issue

make a meaningful impact on educational progress? If it does not, it is not required under Rowley.

III. The lower court has gone beyond the intent of Congress in passing the EAHCA.

Congress expressly stated in its definition of "related services" in the EAHCA that the term does not include "medical services" except to the extent required for "diagnostic and evaluation purposes only." How, then, does the lower court reach the conclusion that CIC is required? By the tortured reasoning that because the Texas Medical Society states that the procedure can be performed by a lay person, when prescribed by a licensed physician, the performance of CIC is suddenly transformed into a non-medical service.

We direct this Court's attention to the description in the lower court opinion of the CIC procedure, Appendix to Petition for Certiorari at pages 73a-73b. One look should lead this Court to take judicial no-

tice of the fact that CIC is a "medical service." The clear implication of the statute is that medical services should be provided only for a specific limited purpose, i.e., diagnosis and evaluation, not for an ongoing or continuous medical need. Since Respondents do not claim that the CIC is for "diagnostic and evaluation purposes" it is excluded from the coverage of the statute.

IV. The decision below was designed for a large suburban district, but will affect all districts, regardless of size and resources.

In the fall of 1982, the Department of Education published for comment a Notice of Proposed Rulemaking under the EAHCA. 47 Fed. Reg. 33836. Section 300.4(b)(10) of that notice (attached at Appendix A) suggested that the provision of related services be limited to non-medical services as designated by state law. In response to that notice, NSBA surveyed its member school districts in order to provide the

Department with a clear picture of the problems school districts are having with the regulations as they presently stand.

School districts in 19 states, with student populations ranging from nearly one million to less than 700, provided responses to NSBA. One main theme soon became apparent in their comments -- nearly all districts expressed their dismay that, given their limited educational budgets, they are being required to take on responsibilities better placed with other social agencies. As one survey respondent stated, "Schools in [this state] have become, by default, the major social agency serving the health, psychological, respite and custodial care needs of children."

Should the school districts be forced to take on these multiple roles? The answer is a most definite no. It is impossible for one body to be all things to all people. In trying to solve one portion of a problem, it is important not to overlook

the needs and constraints of the whole. Judicially formulated requirements pertaining to related services are one of the most difficult, if not the single most difficult, expenditure to justify to those who are complaining about the dwindling funds available for the education of all public school children.

Alternately, should it be found necessary for the schools to take on these many tasks, the decision is one best made by the state, not the judiciary. Only the state and local governments are fully aware of the myriad considerations that go into allocating scarce fiscal resources. Judicial tampering with this allocation of responsibility and resources will only serve to upset the careful balance that states have reached, and ultimately, do more harm than good to those it is attempting to help. A study by the Rand Corporation for the Department of Education concluded that "all states are experiencing difficulties in

trying to provide related services to handicapped youth." A major part of the problem noted is definitional uncertainty, with school districts providing what they consider to be medical services to students because of court imposed mandates.

Though the Irving School District is a moderately large district with about 22,000 students, and might be able to muster the necessary resources to undertake the lower court's mandate, it must be noted that it is not a "typical" school district. 87% of the 16,000 school districts in this country have less than 5,000 students, and 25% have less than 300 students. These school districts are also falling under the mandate of the circuit courts that have ruled that CIC and other non-educational services must be provided to students within their bounds.

These smaller districts, which lack the specialized staff to perform such tasks, will incur even higher costs than those faced by Petitioner. When one considers

the full range of medical services that schools, if the decision below is taken to its logical conclusions, may soon be forced to provide, the costs begin to multiply rapidly. Under the lower court decision, schools would be obligated to provide insulin injections, dialysis, maintain tracheostomies and perform other life-sustaining medical services. In fact, courts are requiring such services at the present time. To provide these services, other programs -- educational programs -- will have to be sacrificed, and the original intent of the Act, to provide an education for handicapped children, will ultimately suffer.

It is not just the direct costs of providing the related services, but also the indirect burdens that attend them that concern school districts. School boards today are wide open to tort liability claims. With insurance costs already sky high, districts will now be faced with adding an additional risk -- medical services -- to the

policies which try to protect them. Many may find in the long term that it is more expedient to hire medical personnel - thus stretching tight budgets even further -- rather than face this potential liability.

Additionally, unions across the country are already beginning efforts to have handicapped children "triple-counted" for purposes of determining class size, because of the extra time and effort these children need. Faced with the prospect of having to provide medical services, they may seek to raise this figure even higher, if indeed, their contracts will even let them perform medical services, a question yet to be answered.

Such fears are not groundless. In at least one case, it was noted that school personnel had filed grievances charging "violation of their contracts of employment by being required to perform duties of a medical nature outside the scope of their contractual duties." See Hawaii Department

of Education v. Dorr, 531 F. Supp. 517 (D. Hawaii 1982). These concerns do not reflect cold hearted callousness on the part of school districts and their employees, but rather legitimate fears --"fear that they could not perform the medical procedure correctly ... fear of the personal aspects of the procedure ... and fear of being sued if something untoward occurred during the procedure." Id.

CONCLUSION

The First and Fifth Circuits are in complete opposition on the question of the right to attorneys' fees in a case involving both § 504 and EAHCA. That conflict should be resolved by this Court.

Despite growing fiscal constraints and federal budget cutbacks, school districts today are spending at least twice as much educating their handicapped students as they do educating their non-handicapped students. This is not to say that the dis-

tricts begrudge handicapped children the extra effort needed to help them benefit from their education. Rather, what the districts do take issue with is the provision of costly non-educational services currently being mandated by the judicial system. Though the services may be necessary to the child's physical well being, it should not be the school districts -- which can ill afford it - that should have to provide for every need of the handicapped child, no matter how tenuously related to the effort to educate.

The financial impact of this decision on school districts across the country is potentially enormous, particulary because the lower court, by finding a violation of § 504, as well as the EACHA, includes within the protection of its mandate handicapped children who would otherwise require no special education or other services of the school district. In addition, this case is directly contrary to this Court's

admonition to the lower courts to keep to their mission of interpreting the laws, not making them.

This case also provides an opportunity for this Court to provide badly needed guidance to lower courts as to the meaning of Southeastern Community College as it relates to school districts. Just how far must school districts go in taking affirmative efforts to ease the burdens that nature has imposed on handicapped children?

Respectfully submitted,

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APPENDIX A

§ 300.4(b)(10)

(10) "Related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, early identification and assessment of handicapping conditions in children, recreation, and counseling services.

The term does not include medical services (services relating to the practice of medicine) except for those that are for diagnostic or evaluation purposes. A public agency is not required to provide such services as--

(A) Life-sustaining procedures that -

(1) Can be provided outside the normal school day;

(2) Must be performed under sterile conditions;

(3) Must be administered by specially-trained, licensed health care professionals; or

(4) Entail a significant risk of illness or more than minimal injury to the child;

(B) Surgical procedures;

(C) Medication or the administration of medication by licensed health care professionals;

(D) Individually prescribed devices (such as eye-glasses, orthopedic equipment, and hearing aids), except that the public agency may, at its discretion, use funds under this part to provide these devices for use by a handicapped child while the child is in schools.

(ii) In determining whether a service is required to assist a handicapped child to benefit from special education, in developing the child's individualized educational program, a public agency is not precluded from establishing reasonable limitations relating to--

(A) The level, frequency, location, and duration of the services required;

(B) The qualifications of the providers of those services, where services are available from more than one qualified provider; and

(C) Services required in light of educational placement appropriate for the child under Sections 300.160 and 300.161.